HON'BLE MR. JUSTICE BILAL NAZKI

AND

HON'BLE MR. JUSTICE G. CHANDRAIAH

W.P.NO. 354 OF 2006

Dt. 16.6.2006

Between:

M/s. Delta Lubricants

…Petitioner

and

The Deputy Commercial Tax Officer

…Respondent

HON'BLE MR. JUSTICE BILAL NAZKI

AND

HON'BLE MR. JUSTICE G. CHANDRAIAH

W.P.NO. 354 OF 2006

ORDER: (Per Hon'ble Mr. Justice Bilal Nazki)

An order of assessment and a notice issued in Form VAT 305 are challenged by this writ petition. The tax under declared due to Tax Department was Rs.4,28,800/- and penalty imposed was Rs.5,78,699, total demand of Rs.10,07,499/- has been raised. The notice is challenged mainly on the ground that the provisions of law were not followed while making the assessment. The petitioner claimed to have submitted his monthly returns for the period from April to November, 2005 in Form VAT 200 and paid the tax due on such sales turnover after claiming input tax credit in terms of Section 13 of the VAT Act. The respondent served a notice in Form 304 on 8.11.2005 on the petitioner. The petitioner's business premises was visited by the respondent and the books of accounts maintained by the petitioner were also examined. On the basis of such perusal of the books of accounts, the respondent issued a notice of assessment in Form VAT 305 on 10.11.2005 proposing to assess the petitioner for the period from 1.4.2005 to 8.11.2005 on the alleged under declared tax of Rs.6,23,960/- and also to levy penalty of Rs.6,23,960/- equivalent to 100% of the alleged under declared tax amount. An explanation was given. The issues raised in this case relate to mainly factual issues, whether any tax was due from the petitioner or not; whether he had under valued or not; and whether he had paid deficit amount of tax. Notice was given, objections were invited and after consideration, the impugned order was passed and the petitioner has an efficacious remedy by way of appeal. Therefore as far as assessment is concerned, this Court would not be in a position to concede to the request of the petitioner to quash the assessment. But, at the same time, this Court has found, as it has been argued, that the tax as well as penalty could not be imposed by the same order. In this connection reference is made to Section 53 of the Andhra Pradesh Value Added Tax Act, 2005. Section 53 lays down the procedure for levying penalty for failure to declare tax due.

Under Section 53 (3) it is stated,

> "Any dealer who has under declared tax, and where it is established that fraud or willful neglect has been committed he shall be liable to pay penalty equal to the tax under declared; besides being liable for prosecution:
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> Provided that before levying penalty under this Section the authority prescribed shall give the dealer a reasonable opportunity of being heard."

Notice in Form VAT 305 A demands tax of Rs.12,47,920/- which includes penalty of Rs.6,23,960/-. The petitioner was asked to file objections within 7 days. There is no finding in the notice that the dealer had under declared tax and committed fraud or willful neglect which is essential ingredient of Section 53 (3) of the VAT Act. Even in the order passed it is no where stated that under declared value was result of fraud or willful neglect. Therefore, in our view, the penalty imposed was without jurisdiction.

The learned counsel for the respondent, however, submits that the penalty and assessment have to come together in view of the fact that the assessment and penalty have been prescribed in a single Form 305 of the VAT Act. The format of the form is not going to change the meaning of Section 53 (3) of the VAT Act. Penalty of 100% cannot be imposed unless it is established that under valuation was result of fraud or willful neglect and before passing order of penalty the dealer has to be given a reasonable opportunity of being heard. It may be also noted that in the tabular form of notice in Form 305 A, the total tax due that has been demanded, does not include the penalty part. Reference is made to a Full Bench judgment of this Court reported in *Mahaveer Bangles Vs. Commercial Tax Officer, Tarapet, Vijayawada* to canvass that proceedings of assessment and penalty could be simultaneous. The Court was dealing with Section 14 of the APGST Act which reads as under,

> "Section 14: Assessment of tax, - (1) If the assessing authority is satisfied that any return submitted under

section 13 is correct and complete, he shall assess the amount of tax payable by the dealer on the basis thereof; but if the return appears to him to be incorrect or incomplete, he shall, after giving the dealer a reasonable opportunity of proving the correctness and completeness of the return submitted by him and making such inquiry as he deems necessary, assess to the best of his judgment, the amount of tax due from the dealer. An assessment under this section shall be made only within a period of four years from the expiry of the year to which the assessment relates.

(1-A) (Not relevant).

(2) When making an assessment to the best of judgment under sub-section (1), the assessing authority may also direct the dealer to pay in addition to tax assessed a penalty as specified in sub-section (8) on the turnover that was not disclosed by the dealer in his return."

The provision was altogether different which was being interpreted by the Full Bench of this Court. Even otherwise, it held,

"Thus, while we see no objection for the simultaneous levy of penalty, we have a note of caution against such simultaneous levy. As the cause of action for best judgment assessment and levy of penalty is broadly the same viz., furnishing of an incomplete or incorrect return warranting rejection of the return, some times the assessee may find it useful to press into service the findings/observations in the assessment order. He may be able to demonstrate that the best judgment assessment was based upon the mere failure of the assessee to discharge the burden of proof cast by section 7-A but not on account of deliberate concealment of the correct figures and particulars. The assessee may therefore plead that it is not a fit case for levy of penalty even on the findings of the assessing officer. Penalty being not consequential to the assessment, the assessee can very well take the plea that by reason of simultaneous levy of penalty, he was denied the opportunity of taking aid from the contents of the assessment order itself to the extent they help him. To avoid such objections, it is desirable that as far as practicable, the penalty proceedings are

concluded after the assessment is made, though they might have been initiated earlier. Otherwise, the penalty orders may often become vulnerable to attack on the ground of denial of reasonable opportunity or the like grounds. However, we do not wish to state as a proposition of law that a penalty order passed simultaneous with an assessment order would always be vitiated. It depends upon the facts and circumstances of each case."

For these reasons, we allow the writ petition to the extent of quashing the penalty imposed by the impugned notice. However the respondent is free to initiate the proceedings for imposing the penalty, if they are advised so.

As far as assessment is concerned, the petitioner is at liberty to seek alternate remedies which are available in law.

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BILAL NAZKI J.

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G.CHANDRIAH J.

Dt. 16.6.2006

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